RE SANDA INDUSTRIES BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[ORIGINATING SUMMONS NO: D2-24-533-1998]
23 NOVEMBER 1998

COMPANY LAW: *Arrangements and reconstructions - Restraining order - Application to restrain creditors from taking any proceedings - Requirements therefor - No person nominated by creditors to act as director - Whether restraining order could be granted without court approving or appointing person nominated as director - Whether court bound to approve or appoint nominee as director - Companies Act 1965, ss. 176(10) & (10A)(d)*

The applicants filed an *ex parte* application for orders under s. 176(1) of the Companies Act 1965 ('the Act') and for a restraining order under s. 176(10) of the Act. Contrary to s. 176(10A)(d), no person was nominated by the creditors for the court to approve or appoint as director. The issue was whether the court could, notwithstanding the said omission, grant a restraining order.

Held:

[1] Section 176(10A)(d) of the Act gives the court the power or discretion to approve or appoint the person nominated as a director. The court is not bound to approve or appoint him. For good reason it may refuse to approve or appoint him. If the court does not approve or appoint him, the court is not to grant a restraining order.

[2] There must be a person approved or appointed under s. 176(10A)(d) of the Act if there is to be a restraining order under s. 176(10) of the Act. If, for whatever reason, no person is nominated by the creditors, there can be no one to approve or appoint. Where no one is approved or appointed, no restraining order may be granted.

[Application dismissed.]

Legislation referred to:
Companies Act 1965, s. 176(1), (10), (10A)(d)

For the applicants - Azhar Azizan Harun; M/s Azhar & Goh

Reported by Cindy Chan

JUDGMENT

Abdul Aziz Mohamad J:

This is an *ex parte* application, filed on 19 November 1998, for orders mainly under sub-s. (1) of s. 176 of the Companies Act 1965 and for a restraining order under sub-s. (10).

On 1 November 1998, sub-s. (10A) came into force. By that subsection, Parliament allows the court to grant a restraining order under sub-s. (10) "if and only if" the requirements of paras (a), (b), (c) and (d) are met. The requirement of paragraph (d) is that:

> [The court] approves the person nominated by a majority of the creditors in the application by the company under subsection (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.

No person has been nominated for the purposes of para (d). Some indication of the reason for the failure has been given orally by learned counsel for the applicants. He submitted that the proper construction of para (d) is that if no person has been nominated pursuant to para (d), the court is not required by that paragraph to approve or appoint any person to act as a director of the company and therefore the requirement of para (d) will not apply.

My opinion as to the true construction of para (d) is as follows.

Paragraph (d) gives the court the power or discretion to approve or appoint as a director the person nominated. The court is not bound to approve or appoint him. For good reason it may refuse to approve or appoint him. If the court does not approve or appoint him, the court is not to grant a restraining order. In other words, even where a person is nominated, no restraining order may be granted if the court does not approve or appoint him to act as a director. That serves to convince me that the intention of Parliament as regards para (d) is that there must be a person approved or appointed under that paragraph if there is to be a restraining order under sub-s. (10). So if, for whatever reason, no person is nominated by the creditors, there can be no one to approve or appoint, no one then is approved or appointed, and no restraining order may be granted.

I am, therefore, not at liberty to grant the restraining order.